IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

The petition raises no issue worthy of review by this Court. The court of appeals refused to rewrite an unambiguous statute to reinstate "so poor a method of enforcement" (Pet. 14a) which Congress had abandoned. Repeal of the old method did not weaken

Clayton Act enforcement;[1] the new statute provides "what the Commission says is a better method" (Pet. 16a).

The court of appeals' decision is correct. Repeal is clear on the face of the statute,[2] as the Commission recognized at the time of enactment.[3] There is no reason to suppose that Congress intended anything other than what it so obviously accomplished:

a. abolition of a cumbersome procedure with substitution of a more expeditious one, and

b. preservation of the old procedure in a limited category of cases,—those in which, by reason of the previous initiation of a review or enforcement proceeding, an investment had already been made by litigants and the courts.

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[1] See letter of Commissioner Elman of June 23, 1966, to Senator Sparkman, Chairman of the Senate Select Small Business Committee, set out as Appendix A to this memorandum. The letter was released to counsel for respondent by Senator Sparkman.

[2] 1 U.S.C. § 109 has no application here. That statute, which does not apply to this case in which jurisdiction has been expressly withdrawn by Congress except as to a specific class of proceedings, was "meant to obviate mere technical abatement" arising from amendment and repeal of a substantive prohibition (*Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964); Comment, 54 Georgetown L.J. 173 (1965)). Furthermore, Jantzen had incurred no "penalty, forfeiture or liability" under the repealed statute. The Clayton Act order against Jantzen was not judicially enforcible until violated. The violations occurred *after* enactment of the Finality Act. Thus, in 1959 at the time of repeal of the court of appeals' jurisdiction, Jantzen had incurred no enforcement "liability."

[3] The court of appeals found that when the Finality Act was adopted, "the Commission strongly urged that the former enforcement procedure . . . was no longer in effect" (Pet. 8a).

Clayton Act enforcement will be strengthened by denying the petition for a writ of certiorari.[4]

Respectfully submitted,

EDWIN S. ROCKEFELLER
DONALD H. GREEN
JOEL E. HOFFMAN
WALD, HARKRADER & ROCKEFELLER
1225 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorneys for Respondent

FRANKLIN H. MIZE
JANTZEN, INC.
P. O. Box 3001
Portland, Oregon 97208
Of Counsel

[4] Alternatively, in view of the clear statement in the opinion of the court of appeals of the reasons for its decision, this Court could meet the Commission's request by granting the writ and affirming the decision of the court below, per curiam.

APPENDIX A

FEDERAL TRADE COMMISSION
WASHINGTON 25, D. C.

June 23, 1966

Honorable John Sparkman
Chairman, Select Committee on
Small Business
United States Senate
Washington, D. C. 20510

Re: Federal Trade Commission v. Jantzen Inc.,
9th Cir. No. 20,021—FTC Docket 7247

Dear Mr. Chairman:

I do not agree with the Commission's reply of this date to your letter of June 14, 1966, and for that reason am sending you a separate reply.

It seems to me that the decision of the Court of Appeals in the *Jantzen* case has been the subject of considerable misunderstanding. It has been asserted, for example, that the *Jantzen* decision nullifies 45 years of Clayton Act enforcement; that it wipes out all of the Clayton Act orders issued by the Commission prior to 1959; that these orders were "enforceable" prior to the *Jantzen* decision, and that they are now "unenforceable"; and that under the Ninth Circuits's decision, no possible enforceable sanction remains in regard to the pre-1959 orders.

I believe that these assertions are entirely unfounded. They rest upon a misreading of the opinion of the Court of Appeals in the *Jantzen* case, and upon a failure to appreciate the enormous defects and complexities of the old enforcement procedure under the pre-1959 provisions of Section 11 of the Clayton Act. To answer the specific question you ask: I believe that it would be *more* easy and effective for the Commission to enforce pre-1959 Clayton Act orders under the procedure sanctioned by the Court

of Appeals in the *Jantzen* case than under the old pre-1959 Clayton Act procedure.

Under the old enforcement procedure, a pre-1959 Clayton Act order issued by the Commission was not final or enforceable as such. The order was "enforceable" only in the sense that it constituted the first step in a long and elaborate series of proceedings leading to the entry of a final court decree of enforcement. Under the old procedure, no penalties attached to violation of an order unless and until the Commission obtained both a judgment of affirmance *and* a decree of enforcement from a court of appeals. *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 477-80.

In order to obtain a judgment of affirmance, the Commission had to satisfy the court of appeals that its order was valid, i.e., that the decision was in accord with the law, that the findings of fact were supported by substantial evidence, that the order was within the Commission's discretion, etc. However, even after the Commission obtained judgment of affirmance, it could not obtain a decree of enforcement unless and until it showed that respondent was disobeying the order and that a second violation had occurred after the order was issued by the Commission. In order to have this latter question of fact determined, the old procedure called for the Commission to conduct a full judicial-type proceeding—in which evidence as to the alleged violation was taken before a hearing examiner, findings of fact were made by him and reviewed by the Commission, etc. In some circuits, it was the practice of the court of appeals, after finding the Commission's order to be valid and entering a judgment of affirmance, to remand the case to the Commission to hold such a judicial-type hearing on the issue of respondent's alleged second violation and to make findings and report back to the court of appeals on that issue before the court would enter a decree of enforcement. E.g., *F.T.C.* v. *Balme*, 23 F. 2d 615, 621 (2d Cir.), cert. denied, 277 U.S. 598; *F.T.C.* v. *Standard Education Society*, 86 F. 2d 692, 698 (2d Cir.);

F.T.C. v. *Herzog*, 150 F. 2d 450 (2d Cir.); *F.T.C.* v. *Baltimore Paint & Color Works*, 41 F. 2d 474, 476 (4th Cir.). The Seventh Circuit had an even stricter rule; it would not consider the validity of a Commission order and enter a judgment of affirmance until the Commission had shown a post-order violation. *F.T.C.* v. *Standard Education Society*, 14 F. 2d 947, 948. In the Ninth Circuit, there was another procedure under which the Commission acted as a special master for the court of appeals before, rather than after, seeking a judgment of affirmance. *F.T.C.* v. *Washington Fish & Oyster Co., Inc.*, 271 F. 2d 39.

The important fact about the old enforcement procedure was that a Commission order was in no sense final or enforceable until the conclusion of these complex and protracted proceedings—including a full-dress judicial-type hearing before the Commission on the issue of respondent's alleged post-order violation.

Where a Commission order was affirmed by a court of appeals, any questions of fact or law thus settled were not open in deciding whether the order had been violated and should therefore be enforced. This was made clear by the Supreme Court in the *Ruberoid* case (343 U.S. at 476-77). To the extent that a pre-1959 order is *res judicata*, its legal effect in that regard is in no way altered by the decision in the *Jantzen* case. A matter which is finally determined and becomes *res judicata* may not be relitigated in any subsequent proceedings, *de novo* or otherwise. Thus, all factual matters decided in the proceedings culminating in the issuance of a pre-1959 Clayton Act order may not be relitigated—regardless whether enforcement of the order is sought under the old procedure or through initiation of new proceedings. The *Jantzen* opinion makes emphatically clear that whatever legal effect or significance a pre-1959 Clayton Act order had, it still has. On page 11 of the slip opinion, the Court of appeals expressly stated that the legal effect and significance of pre-1959 Clayton Act orders was

in no way affected or impaired by its decision: "The [pre-1959] orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were."

What, then, would be the actual practical consequences if the *Jantzen* decision were accepted and followed? As I see them, they are all in the direction of facilitating prompt and effective enforcement of pre-1959 Clayton Act orders. As already indicated, the validity of these orders and their *res judicata* effect has in no way been altered or diminished. Nor has the Court of Appeals changed or increased the Commission's burden of proving a post-order violation after conducting a judicial-type hearing on that issue. Under *Jantzen* a respondent is entitled to such a hearing on that issue before a new order, final under the 1959 amendments made by the Finality Act, is entered by the Commission. But, in that respect, there is no difference from the old pre-1959 procedure, under which a respondent was also entitled to such a judicial-type hearing before a decree enforcing the order could be entered.

I can see no material difference in the nature and scope of the judicial-type hearing conducted by the Commission under the old procedure, when it acted as a special master for a court of appeals in trying the issue of respondent's alleged post-order violation, and that which would be required under *Jantzen* as a prerequisite for the issuance of a new and final order. The Court of Appeals clearly and unambiguously stated (slip opinion, p. 12): "All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three." As a practical matter, any violation of a pre-1959 Clayton Act order which the Commission should now find will inevitably also be in violation of the Clayton

Act. It is inconceivable that the Commission should seek to obtain, or that a court would impose, penalties for violation of an outstanding pre-1959 Clayton Act order where such violation was not also prohibited by the Act.

Thus, the Court of Appeals in the *Jantzen* case has authorized a relatively simple, efficient, and economical procedure whereby the Commission, in any case where the circumstances so warrant, may replace an outstanding pre-1959 Clayton Act order with a new order subject to the provisions of the Finality Act. This could be done either by the issuance of a new complaint or by reopening the proceeding to determine whether the old order should be modified and replaced by a new, final order. (Section 3.28 of the Commission's Rules of Practice.) In such a subsequent proceeding the burden of proof resting on the Commission to prove a second violation would be exactly the same—no more and no less—as under the old pre-1959 enforcement procedure; and the nature and scope of the hearing would also be exactly the same as under the old procedure.

In sum, the *Jantzen* decision does not "wipe out" or in any respect impair the value, validity, and enforceability of pre-1959 orders. What it does do is to enable the Commission to establish a new, faster, and better procedure for enforcing such orders, saving time and money both for the Commission and respondents. If, as the Commission is seeking, the Supreme Court should reverse the decision of the Court of Appeals in *Jantzen*, the Commission would have "won" the right to go back to the old, unsatisfactory pre-1959 enforcement procedure. As the Court of Appeals pointed out in footnote 11 of its opinion, the old procedure was characterized in the hearings before Congress as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic".

From the standpoint of promoting expeditious and effective law enforcement, a decision reinstating the old enforcement procedure which Congress so wisely abandoned in 1959, and precluding the establishment of a more speedy and efficient procedure along the lines indicated by the Court of Appeals in *Jantzen*, would seem to be a Pyrrhic victory. For that reason, I did not concur in the Commission's request that the Solicitor General file a petition for certiorari in the Supreme Court seeking reversal of the Court of Appeals' decision in *Jantzen*. (Enclosed is a copy of the dissenting statement which I sent to the Solicitor General.)

With best wishes,

Sincerely,

PHILIP ELMAN

Re: *FTC* v. *Jantzen*

April 12, 1966

Dissenting Views of Commissioner Elman

I cannot agree that the decision of the Ninth Circuit in this case presents a question "of great importance in enforcing the Clayton Act" warranting Supreme Court review, or that it "jeopardizes" the 400 outstanding unenforced Clayton Act orders issued by the Commission between 1914 and 1959.

The case does not appear to fall within the established standards of certiorari jurisdiction. There is no conflict of decisions requiring resolution by the Supreme Court. For the various reasons spelled out in the opinion of the Court of Appeals, the decision will not impose any practical impediments to the enforcement of the Clayton Act. Its alleged adverse effects are theoretical, abstract, and highly exaggerated.

While there are 400 outstanding pre-1959 Clayton Act orders, there have been exceedingly few enforcement proceedings arising from alleged violations of such orders. The enforcement proceedings in the last five years can be counted on the fingers of one hand. So far as the Commission knows, the respondents under such orders are generally obeying them. Another explanation for the paucity of such proceedings is the cumbersome and inadequate (see also the various other adjectives quoted in footnote 11 of the court's opinion) pre-1959 method of enforcement. But like the Court of Appeals, I "cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement."

As the Court of Appeals has pointed out, the full objectives of Clayton Act enforcement against respondents believed to be violating pre-1959 orders can be more effectively and sensibly achieved by the issuance of new complaints, instead of wasting time and money by attempting to enforce the orders through the old ineffectual method. Under either procedure the Commission must hold an adjudicative hearing to establish a violation. But by proceeding with a new complaint, the Commission avoids all of the messy problems and pitfalls of the pre-1959 procedure. An order entered after a hearing on a *new* complaint becomes final by operation of law, without the Commission's having to go to a Court of Appeals, if the respondent does not seek review in 60 days. On the other hand, a Commission finding of violation in a hearing held under the pre-1959 procedure is not final and self-executing in any case; its enforcement can be obtained only after the Commission goes to the Court of Appeals *and* satisfies the court that respondent has violated the order.

The rules and procedures governing a hearing on a new complaint are established and clear. On the other hand, a "compliance investigation" proceeding under the pre-1959 method of enforcement is so anomalous and extraor-

dinary that the Commission's Rules of Practice provide no specific guidance on how it shall be conducted. In recent years the Commission has in these proceedings established *ad hoc* ground rules designed to assure that the forms of adjudication are satisfied without impairing the investigative character and purpose of the proceeding. The reasons for this hybrid procedure lie in the peculiarities and absurdities of the pre-1959 enforcement scheme.

Under the pre-amendment Clayton Act the Commission, as a prerequisite of going to the Court of Appeals for a decree of enforcement, must satisfy the court that the respondent has violated the order. *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470. However, if the Commission's finding of violation "is made as a result of an ex parte informal investigation, there are no 'pleadings, evidence, and proceedings' within the meaning of the statute. In this event the court, if it affirms the cease and desist order and if the assertion of violation is disputed, must remand the matter to the Commission for formal proceedings on the question of whether the order has been violated. Indeed, this is the usual practice." *F.T.C.* v. *Washington Fish & Oyster Co., Inc.*, 271 F. 2d 39 (9th Cir. 1959). To avoid such remands, the Commission adopted the practice of conducting "formal" compliance investigations, not *ex parte* but with all the trappings of an adjudicatory proceeding.

It is asserted that the decision of the Ninth Circuit has the effect of "nullifying the major part of the Commission's accomplishments under [the Clayton Act] for the first 45 years of its existence." The implication is that, if the Ninth Circuit's decision stands, the lid will be off and the respondents under the outstanding 400 pre-1959 orders will start violating them with impunity. This seems to be farfetched, to put it mildly. The Commission has never before regarded the pre-1959 method of enforcement as an effective deterrent against violation of Clayton Act

orders. In fact, it kept telling Congress the opposite until some action was finally taken in 1959. How can the Commission *now* tell the Supreme Court, for purposes of getting certiorari, that the pre-1959 method of enforcement is so essential and important? If the Commission wanted Congress to preserve the pre-1959 method for enforcement of pre-1959 orders, why did it not propose a provision to that effect in the Finality Act? If, through inadvertence, neglect, or otherwise, such a provision was not included by Congress, why should the Supreme Court be asked to supply the omission? It is empty hyperbole to say that the Ninth Circuit has "wiped out" the 400 pre-1959 orders. It is more accurate to say that it has wiped out an archaic and ridiculous (see footnote 11 again) method of enforcement whose total demise the Commission should be the first to cheer.*

* In any event, the pending *Standard Motor Products* case in the Second Circuit offers the Commission an opportunity to secure a conflict of decisions—assuming it is not the better part of wisdom to accept the Ninth Circuit's interpretation of the Finality Act.